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No. 93-1689

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1993

EDWARD E. RICE,
Petitioner,

vs.

OHIO DEPARTMENT OF TRANSPORTATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The statement of the case presented by the Petitioner in this matter is reasonably accurate but incomplete. Petitioner fails to point out that Edward Rice is a *lifelong Republican* who applied for a promotion in 1981 and 1982 to the *unclassified* (non-civil service) position of Administrative Assistant. The Administrative Assistant was supervised day-to-day by

the Deputy District Director, but reported to, advised and was appointed by the Director, David Weir, an appointee of the *Republican* Governor.

Petitioner also fails to include in his description of the position of Administrative Assistant, District Deputy Director William Brayshaw's testimony that the Administrative Assistant position was the "top political position" in the district, as well as the "pipeline" between the central office and local officials (Petitioner's Appendix B, p. 10).

Furthermore, Petitioner misstates the evidence presented at trial when he states that "the position description of the Administrative Assistant does not reference any political or confidential duties . . . ." The district court found that the position description of the Administrative Assistant stated that the administrative assistant:

> "*Acts as liaison with central office administrators* and the district disseminating information on a variety of operational subjects pertaining to the administration, budget and auditing, planning, right of way, and construction areas. Answers both technical and nontechnical questions arising from such information;
>
> "Confers, for the District Deputy Director, with all staff members of these work units on matters involving *policy determinations and the administration thereof;*" (emphasis added).

(Petitioner's Appendix B, p. 9).

Finally, the district court concluded after trial that Petitioner "failed to prove by a preponderance of evidence that his lack of support of the Republican Party was a substantial or motivating factor in Defendant's refusal to promote him to the position of Administrative Assistant." (Petitioner's Appendix B, p. 20).

REASONS FOR DENYING THE WRIT

This Court Should Deny the Writ Because This Case Does Not Present A Question of Constitutional Law Which Will Alter the Outcome of the Case.

This petition should not be granted because, *assuming arguendo,* the standard which Petitioner proposes is adopted regarding the First Amendment prohibition against the use of political affiliation and governmental employment decisions, when applied to the facts in this case, would not alter the district court's determination that Petitioner has failed to prove by a preponderance of the evidence that his lack of support for the Republican Party was a substantial or motivating factor in the Defendant's refusal to promote him to the position of Administrative Assistant (Petitioner's Appendix B, p. 20). Furthermore, in contrast to the facts in *Akers v. Caperton,* 998 F.2d 220 (4th Cir. 1993) and *Selch v. Letts,* 5 F.3d 1040 (7th Cir. 1993), the two cases cited by Petitioner in support of his position, the facts in *Rice* do not involve a governmental employee who belongs to one political party seeking promotion from an administration of a different political party. Contrary to the facts in *Selch* and *Akers,* Mr. Rice is a lifelong Republican whose primary allegation is that he was not "Republican enough" to receive an appointment to an unclassified, non-civil service protected position from a Republican administration.

Finally, after reviewing the facts in this case and after thorough analysis of this Court's prior decisions as well as the decisions of various circuit courts, the Sixth Circuit found no inconsistency in the manner in which the *Elrod/Branti*[1] exception has been interpreted. Regarding the specific issues raised *sub judice,* the Sixth Circuit held:

> If the director and a central office staff are to do their jobs properly, they need lines of communication with the public and with political leaders who are in touch with the public. To a significant extent, the record of this case shows without contradiction, those lines of communication run through the 24 district deputy directors and administrative assistants located in Department of Transportation districts throughout the state.
>
> * * *
>
> We do not mean to suggest that Ohio's Director of Transportation would be free to make patronage appointments "wholesale" to use the term repeatedly employed by Justice Brennan in *Elrod,* even if Ohio law permitted it. In a department of 9,000 persons, however it is hardly unreasonable to suppose that a few dozen positions could properly be classified as politically sensitive.

(Petitioner's Appendix A, pp. 25, 27).

Given Petitioner's failure to prove by a preponderance of evidence at trial that he was subject to discrimination of any kind, facts which distinguish this case from either *Selch* and *Akers* and the fact that the well-reasoned decision of the Sixth Circuit is entirely consistent with this Court's prior decisions, Respondents resepectfully request the court to deny the writ.

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[1] *Elrod v. Burns,* 427 U.S. 347 (1975); *Branti v. Finkel,* 445 U.S. 507 (1980).

CONCLUSION

For these reasons, a writ of certiorari should not be issued to the United States Court of Appeals for the Sixth Circuit to review the question presented by this petition.

Respectfully submitted,

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